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**DEC 31 1958**

JAMES H. BR. WING, Clerk

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1958.

**No. [REDACTED] 12**

**THE MINNEAPOLIS & ST. LOUIS RAILWAY  
COMPANY,**

*Appellant,*

*against*

**UNITED STATES OF AMERICA, INTERSTATE  
COMMERCE COMMISSION, ET AL.,**

*Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF MINNESOTA.

**MOTION TO AFFIRM.**

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Railroad Company, Appellees.*



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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1958.

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**No. 552.**

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THE MINNEAPOLIS & ST. LOUIS RAILWAY  
COMPANY,

*Appellant,*

*against*

UNITED STATES OF AMERICA, INTERSTATE  
COMMERCE COMMISSION, ET AL.,

*Appellees.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF MINNESOTA.

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**MOTION TO AFFIRM.**

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The Atchison, Topeka and Santa Fe Railway Company, The Pennsylvania Railroad Company, and Pennsylvania Company, appellees in the above entitled cause, move that the judgment of the District Court be affirmed on the ground that the questions presented on this appeal are so unsubstantial as not to need further argument.

## STATEMENT OF THE CASE.

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This is not a difficult case. Appellant's presentation of it in its Jurisdictional Statement, in addition to being in-temperate, is neither fair nor accurate.

A comprehensive recital of the facts is contained in the Report of the Interstate Commerce Commission printed as Appendix B to the Jurisdictional Statement<sup>1</sup> (pp. 55 *et seq.*). *Toledo, Peoria & Western R. Co., Control*, 295 I. C. C. 523 (1957). But for present purposes the essential facts may be concisely stated.

Appellee, The Atchison, Topeka and Santa Fe Railway Company (Santa Fe), on May 26, 1955, contracted, subject to the approval of the Interstate Commerce Commission, to buy from the holders thereof all of the outstanding stock of the Toledo, Peoria & Western Railroad Company (Western.) Subsequently it agreed, also subject to Commission approval, to sell 50 per cent of the Western stock to appellee, Pennsylvania Company, a wholly-owned subsidiary of appellee, The Pennsylvania Railroad Company (Pennsylvania).

At the same time, appellant wanted to purchase all of the Western stock. However, the holders thereof agreed to sell to Santa Fe.

Thereafter, appellees filed a joint application seeking Commission approval under Section 5 (2) of the Interstate Commerce Act for Santa Fe and Pennsylvania Company each to acquire and hold 50 per cent of the Western stock.

1. Numbers in parentheses preceded by "J. S." refer to pages of appellant's jurisdictional statement; those preceded by "Tr" refer to the transcript before the Commission; those preceded by "H." refer to exhibits received by the Commission.

Appellant filed a similar application seeking Commission approval of its proposal.

The two applications were considered at a consolidated hearing before a Commission examiner at Peoria, Illinois. The hearing was an extended one, from February 1 to 14, 1956. Numerous witnesses were heard and many exhibits received in evidence. Several other railroads intervened at that hearing for various reasons not now important because they have not contested the decision of the court below and are not before this Court.

The examiner issued a proposed report recommending approval of the Santa Fe-Pennsylvania acquisition and rejection of appellant's application.

Thereafter, upon exceptions and replies to exceptions to the proposed report, the case was argued orally before Division 4 of the Commission (Commissioners Mitchell, Arpaia, and Winchell). Division 4 issued a comprehensive report approving the application of Santa Fe-Pennsylvania and rejecting that filed by appellant.

The Commission was confronted, for present purposes, with two diametrically opposed plans. That of Santa Fe-Pennsylvania contemplated the continued existence and operation of Western as a separate carrier under its local management. It was supported by many interveners, including the cities and towns served by Western from one end of the line to the other,<sup>2</sup> leading civic and business organizations, shippers located in the area served by Western, and The Railway Labor Executives Association (representing Western's employees). Other shippers, both local and off-line, appeared and testified in support of the Santa Fe-Pennsylvania application.

2. Communities which intervened were, Keokuk, Iowa, and Warsaw, LaHarpe, Lomax, Bushnell, Canton, Peoria, East Peoria, Eureka, Secor, Gridley, Chenoa, Fairbury, Borrest, Gilman, Watseka and Sheldahl, Illinois.

Appellant's application, on the other hand, proposed the extinguishment of Western as a separate and independently operated railroad, for it sought to integrate Western into appellant's railroad for ownership, management, and operation. Appellant's proposal was supported only by the states of Minnesota and South Dakota. It was strongly opposed by the State of Illinois. No shippers or local community interests lent their support.

In approving the Santa Fe-Pennsylvania application, the Commission found that "public interest demands that the present policies of Western in all respects be continued." (J. S. 89.) Those policies would only be continued under the Santa Fe-Pennsylvania plan and for that reason appellant's proposal was rejected. *Minneapolis & St. L. Ry. Co. v. United States*, 165 F. Supp. 893 (D. Minn. 1958). The Commission expressly found that the policies contemplated by appellant "would be extremely harmful to other carriers" (J. S. 73), and that most of the economies proposed by appellant "would be effected at the expense of Western's employees." (J. S. 74.)

The full Commission denied the reconsideration and reargument sought by appellant, terminating what appellant describes as "a sorry picture of administrative procedure at its worst." (J. S. 13.)

Appellant, as was its right under 28 U. S. C. § 1336, then appealed to a three judge court.

The court below received comprehensive briefs and heard extended oral argument. It found that the Commission's proceedings complied with applicable law in all respects and concluded that: "The Commission's Order is based on adequate findings supported by substantial evidence in the record before it." Appellant's complaint was, accordingly, dismissed. The court, appellant charges, "abdicated its duty of judicial review and gave a startling example of judicial obeisance to administrative 'expertise'." (J. S. 13.)

In this Court, appellant attempts to present substantially the same questions resolved against it after full consideration and deliberation by the court below.

### **QUESTIONS PRESENTED.**

Appellant's statement of "Questions Presented" is manifestly no more than an outline of argument. Put correctly, the questions presented—such as they are—would more nearly read as follows:

1. Is the order of the Interstate Commerce Commission here involved supported by adequate findings?

2. Are the findings of the Commission supported by sufficient evidence?

3. Was appellant granted the comparative hearing fairly required under the circumstances of this case?

4. Do any of the considerations involved in Section 1 of the Sherman Act and Sections 7 and 10 of the Clayton Act require judicial rejection of the order of the Commission here involved?

5. Was appellant accorded an adequate review by the District Court?

## ARGUMENT

### 1. THE FINDINGS ARE ADEQUATE AND APPELLANT WAS ACCORDED A COMPARATIVE HEARING.

Appellant's attack on the adequacy of the Commission's findings is closely related to its contention that it was denied a comparative hearing. As there is some duplication in these arguments, both will be discussed here. Questions raised as to the evidentiary support for the findings will be discussed in the next subdivision of this argument.

Appellant begins by citing the substantial evidence rule (*Universal Camera Corp. v. N. L. R. B.*, 340 U. S. 474, 488 (1951)); asserts that it "adduced substantial and persuasive evidence" that its plan conformed to applicable statutory standards; and concludes that the Commission was therefore under a "duty" to make ultimate, basic and subsidiary findings in favor of its application (J. S. 14). In presenting this argument appellant misconceives the function of the reviewing court. The court's function is not to retry the case on the merits or to review the evidence to determine what findings should have been made, *i. e.*, to substitute its judgment for that of the Commission on the broad question of the "public interest", which is committed to the Commission by Section 5(2) of the Interstate Commerce Act (49 U. S. C. § 5(2); J. S. 104-107). The court's function is to determine whether the Commission acted within its statutory authority, whether the findings actually made are adequate to support the ultimate conclusion and whether the challenged findings are supported by substantial evidence.

3. Thus in *McLean Trucking Co. v. United States*, 321 U. S. 67 (1944), the Court said:

"The wisdom and experience of that commission, not of the

This fundamental misconception as to the scope of judicial review apparently has much to do with appellant's charge that the court below abdicated its function.

### **Adequacy of the Findings.**

Appellant says the Commission did not, and could not, make adequate findings to support its decision in favor of Santa Fe and Pennsylvania (J. S. 15); but it does not review the findings actually made. Such a review will demonstrate the lack of substance in the charge that they are inadequate.

The Commission was confronted with two radically different proposals for the future operation of Western's line. Santa Fe and Pennsylvania proposed the continued operation of Western as a separate carrier under its present local management and its present service and traffic policies. Appellant's proposal for integrating Western's line into its own operations necessarily involved the disappearance of Western as a separate and neutral connection for the other 15 carriers with which it presently connects.

In choosing between the two competing applicants, the Commission adopted a standard of public interest which reflected the unique part Western now plays in the nation's transportation system. The key finding was that the "Public interest demands that the present policies of the

courts, must determine whether the proposed consolidation is 'consistent with the public interest.' Cf. *Interstate Commerce Commission v. Illinois Central R. Co.*, 215 U. S. 452; *Pennsylvania Co. v. United States*, 236 U. S. 351; *United States v. Chicago Heights Trucking Co.*, 310 U. S. 344; *Parcell v. United States*, 315 U. S. 381. If the Commission did not exceed the statutory limits within which Congress confined its discretion and its findings are adequate and supported by evidence, it is not our function to upset its order." 321 U. S. at pp. 87-88. And see *United States v. Pierce Auto Freight Lines*, 327 U. S. 515, 535-536 (1946); *Universal Camera Corp. v. N. E. R. B.*, 340 U. S. 474 at 488 (1951).

Western in all respects be continued" (J. S. 89 and see 65). The Santa Fe-Pennsylvania application was granted because it met this standard and was found to be otherwise consistent with the public interest and in furtherance of the National Transportation Policy (J. S. 82, 93-94). Appellant's application did not meet this standard and was dismissed (J. S. 93-94).

The basis for the finding that public interest demands continued operation of Western under its present policies appears in a number of findings throughout the report. Western's policy is to maintain strict neutrality between all its connections, thus emphasizing its strategic location as an overhead carrier through Peoria, as an alternative route, bypassing the congested terminals of Chicago and St. Louis (J. S. 60). As a result, more than two-thirds of its revenues are derived from overhead or bridge traffic (J. S. 61). "Situated as it is between the Santa Fe at Lomax on the west and the Pennsylvania at Effner on the east, the Western receives its long haul and provides a vital direct link essential to the type of through service which is becoming increasingly important not only to the shipping public but to the railroads as well. Fast, strong, and reliable through transportation service is necessary in order for the railroads adequately to compete with the other modes of modern transportation, and the Western, as a direct east-west line, supplies the short-line connection for providing this through service with a minimum of delay" (J. S. 89).<sup>4</sup>

The finding that public interest demands the continued operation of Western under its present policies reflects the

4. In another recent case, *Illinois-Missouri Terminal Ry. Co., Purchase*, I. C. C. Finance Docket No. 18752, the Commission recognized Western's "particularly important position in the Nation's transportation system" as a "valuable link for transcontinental shipments \* \* \*." (Sheets 43-44 of mimeographed report, dated April 2, 1956.)



interests of all parts of the public most directly concerned: off-line shippers using Western as a bridge line for through traffic; the communities along Western's line and local shippers "who regard the present ready access to local management as of inestimable value; the other railroad interveners; and Western's employees (J. S. 72, 88, 91). Briefly summarizing the interests of these various parts of the public, the Commission said:

"Only the Minneapolis and its supporting interveners, the States of Minnesota and South Dakota, advocate the disappearance of the Western as a separate and independent operating carrier. All the other parties to these proceedings, including the railroad interveners, the communities served by the Western, and the shippers who appeared as witnesses, insist that the separate and independent operation of the Western under its present local management is a public necessity." (J. S. 72.)

The basis for approval of the Santa Fe-Pennsylvania application in the light of the above standard of public interest is shown clearly by the findings in the Commission's report. Under their proposal Western would continue to function as a separate carrier under its present local management and under the traffic and service policies which have contributed so much to its success (J. S. 63-64). This plan reflects the natural community of interest resulting from the geographical location of Western as an important link between the Santa Fe on the west and the Pennsylvania on the east in providing fast through service via the Peoria gateway (J. S. 89).<sup>5</sup> Thus Western receives its long haul on traffic interchanged with

5. The importance of this route was convincingly demonstrated by the greatly increased use of Santa Fe and Pennsylvania's connecting services in World War II. Between 1939 and the peak war year, 1944, Western's total traffic increased 62 per cent; its overhead or bridge traffic increased 91 per cent; and its interchange with Santa Fe increased 142 per cent and with Pennsylvania, 105 per cent. (H-5, pp. 11-12.)

Santa Fe and Pennsylvania, while its interchange with most of its other connections, including appellant, is in the Peoria area at the center of its line (J. S. 89). Much of Western's success as a bridge line dates from the construction of Western's connection with the Santa Fe at Lomax in 1927. Since that time Santa Fe and Pennsylvania have cooperated with Western in coordinating their schedules and services to provide a fully competitive service over Western's route (J. S. 60-61, 91). Service, as the Commission found, is the most important factor affecting the routing of traffic (J. S. 76). As a result, Santa Fe and Pennsylvania account for about 70 per cent of Western's interline traffic and revenues (J. S. 61).

The Commission noted the strong shipper support for the Santa Fe-Pennsylvania application based on this long record of cooperation with Western, as well as the support by the communities along Western's line and by Western's employees (J. S. 88, 91). And the Commission recognized that the self-interest of Santa Fe and Pennsylvania would provide assurance for the continuance of Western's present solicitation and service policies in the future (J. S. 75, 81). The Commission thoroughly analyzed the effect of the acquisition on competing carriers and concluded that there would be no undue curtailment of competition (J. S. 75-82).

The Commission found other advantages in Santa Fe-Pennsylvania control. These included increased traffic for Western under the joint applicants' plan to place Effner and Lomax, where they connect with Western, on a solicitation parity with Chicago; stimulation of industrial development in the area served by Western; technical assistance in the realization of economies in operation; advantages in purchasing; and the assurance of a more adequate supply of freight cars for Western (J. S. 75-76; 78, 90-91, 92).

Turning now to appellant's proposal, the Commission's findings clearly show the basis for its rejection. The Commission found that:

"The proposal of Minneapolis unequivocally contemplates the disappearance of Western as an independent and neutral connection for the other 15 carriers with which it presently works. Only the corporate existence of Western would remain. For all practical purposes Western would be integrated, consolidated and merged into the Minneapolis for ownership, management, and operation. Western's headquarters and general offices would be moved from the present location at Peoria to the city of Minneapolis, and all policies and directions for the operation of the joint properties would emanate from that point.  
\* \* \* (J. S. 71-72).

This is directly contrary to the "standard of public interest" as determined by the Commission. Separate operation of Western is essential if it is to continue to perform its primary function as an east-west bridge line working closely with all its connections. The Commission also found that appellant's plan contemplated the diversion of traffic from Western's other connections, rather than continuance of the policy of working closely with them (J. S. 72-73). While it recognized that substantial economies could be effected under appellant's plan, it found that most of the savings would be "at the expense of the Western's employees" (J. S. 74).

In the light of these findings the District Court properly concluded that it could not substitute its judgment for that of the Commission on the broad policy question of the public interest. These findings reflect full consideration of all elements of the public interest involved—the interests of shippers, both local and off-line, using the services of Western and its connections, of the communities served by Western, of Western's employees

and of the 16 connecting railroads which interchange traffic with Western. And the decision to preserve Western's important function in the nation's transportation system as a separately operated bridge railroad linking the east and the west and working closely with all its connections squares with the objective of the National Transportation Policy to foster sound economic conditions in transportation and among the several carriers, "all to the end of developing, coordinating, and preserving a national transportation system . . . adequate to meet the needs of the commerce of the United States, of the Postal Service and of the national defense" (49 U. S. C. preceding § 1; J. S. 103-104).

### Comparative Hearing.

Appellant contends that it was denied a comparative hearing because the Commission failed to make specific findings as to every difference between the two competing applications, citing *Johnston Broadcasting Co. v. F. C. C.*, 175 F. 2d 351, 357 (D. C. Cir. 1949). (J. S. 21-22). But the *Johnston* case dealt with two mutually exclusive applications to do the same thing—to operate a new broadcasting station—and an item by item comparison was appropriate to determine which applicant was better qualified. Here the Commission was confronted with two radically different proposals for the future operation of an existing railroad. An item by item comparison was, therefore, impracticable. The controlling question in evaluating the two competing applications was what function Western could best serve in the national transportation system. A similar approach to a somewhat similar problem by the Federal Communications Commission was upheld by this Court in *F. C. C. v. Allentown Broadcasting Co.*, 349 U. S. 358, 361-63 (1955).

Appellant contends that the Commission was required to make specific findings as to every detail of its proposal

(J. S. 16-17), but this would have served no useful purpose. As the District Court recognized the detailed description of appellant's proposal with all its claimed advantages makes it entirely clear that these were given consideration (J. S. 50-52, 70-75). Specific findings as to each detail were unnecessary because the entire plan to absorb Western into appellant's railroad was found to be contrary to the controlling public interest in the continuance of Western's present policies as a separately operated bridge carrier working closely with all its connections.

Appellant says the Commission's decision is contrary to the National Transportation Policy because it ignores the criteria of economic and efficient service and that the Commission was under a duty to find the "dollar amount" of the proposed economies (J. S. 22, 14).<sup>6</sup> Economies, however, are only one of the criteria to be considered in acquisition cases. *Virginian Ry. Co. Control*, 117 L. C.C. 67, 75 (1926). Both the National Transportation Policy and Section 5(2)(c) of the Interstate Commerce Act require that the interests of employees, as well as other factors, be considered. Here, the Commission clearly recognized that substantial economies could be realized under appellant's proposal but found that "most of the savings would be effected at the expense of Western's employees" (J. S. 74). In this case the interest of Western's employees in the retention of their jobs happily coincided with the interest of the shipping public, the communities served by Western and Western's other rail connections in its continued operation as a separate carrier under its local management.

6. As a matter of fact, the record would not support a specific finding as to the "dollar amount." It was insisted by appellant's counsel that the record clearly show "that the maximum savings are one thing and the actual program is something else" (Tr. 1315). Appellant's president, who testified as to the program, was unable to indicate how it would actually be worked out, saying that "it would be pretty difficult to go beyond what I have tried to outline and the manner in which we would do this thing until we knew what the situation was" (Tr. 1598).

Appellant attacks the concept of separate and independent operation under the control of Santa Fe and Pennsylvania (J. S. 23). But the concept is not new. The Commission has recognized in other cases that separate operation of a controlled carrier under its own local management is an effective factor in preserving existing traffic relationships with connecting lines, and insuring continued neutrality in service.<sup>7</sup> Such separate operation of Western is essential if it is to continue to perform its primary function as an east-west bridge line working closely with all its connections. This was recognized by the Commission as far back as 1924, when it imposed a condition requiring separate operation of the Clinchfield Railway, which was also a bridge line connecting with a number of other railroads. *Clinchfield Ry. Co. Lease*, 90 I. C. C. 112, 132, 133 (1924).

Appellant asserts that the Commission ignored the motivations of Santa Fe and Pennsylvania (J. S. 24). On the contrary, the Commission recognized their perfectly legitimate interest in acquiring control of Western and their self-interest in continuing its present policies (J. S. 61, 75, 81).

Western's line is merely a continuation of Pennsylvania's line from Logansport, Indiana, to Elfiner and is the sole reason for the existence of the latter. Extending across Illinois between the Pennsylvania on the east and Santa Fe on the west, Western interchanges 70 per cent of its interline traffic and two-thirds of its total traffic with these two roads. It is undisputed that for over

7. *Wabash R. Co. Control*, 247 I. C. C. 365, 370-71 (1941); *Wheeling & L. E. Ry.*, 267 I. C. C. 163, 176 (1946); *Niagara Junction R. Co. Control*, 267 I. C. C. 649, 661, 663 (1947); *D. T. & L. R. Co. Control*, 275 I. C. C. 455, 490, 491-92 (1950); *Pacific Coast R. Co. Control*, 282 I. C. C. 600, 607 (1951).

30 years Santa Fe, Western and Pennsylvania have co-operated in coordinating their schedules and service to build up this traffic. It is quite natural, therefore, that Santa Fe and Pennsylvania were interested in continuing this mutually beneficial relationship with Western through the acquisition of the latter's stock when it was put up for sale.

Appellant attempts to raise the ghost of Western's bankruptcy more than 40 years ago under Pennsylvania-Burlington control (J. S. 16); but as subsequent developments have proven, what Western lacked then was an effective connection at the western end of its line to complement the Pennsylvania on the east. The Burlington, with an important line directly into Peoria, had no incentive to support the western part of Western's line. The need for an effective connection on the west was met when the interchange with Santa Fe at Lomax was constructed in 1927. As pointed out in the case authorizing that interchange, "the proposed construction will aid in sustaining that part of the applicant's railroad west of Peoria" (*Construction by T. P. & W.*, 124 I. C. C. 278, 279 (1927)). The soundness of this prediction has been amply demonstrated by the successful growth of Western's traffic in cooperation with Santa Fe and Pennsylvania in the more than 30 years since the construction of the Lomax interchange (J. S. 60-61, 91).<sup>8</sup>

8. Santa Fe has a particularly strong interest in Western's route through Peoria because it does not reach either the Peoria or St. Louis gateways, while its western competitors, the Rock Island and Burlington, serve the Chicago, Peoria and St. Louis gateways directly. The Commission found that the movement of traffic via Western enables Santa Fe to obtain a long haul through Lomax on traffic which might otherwise move via St. Louis; in which event, Santa Fe could receive no haul east of Kansas City and might lose the traffic entirely (J. S. 81). This was recognized in the proceeding involving construction of the interchange at Lomax in 1927, where it was pointed out that "the route to be afforded by the proposed connecting track will perfit of longer hauls to [Western] and the Santa Fe." *Construction by T. P. & W.*, *supra*, 124 I. C. C. at 279.



The Commission did not apply different standards to the claims of traffic diversion, as appellant charges (J. S. 25). The facts were different. Not only the Wabash but the Nickel Plate and Rock Island offered evidence as to the effect of appellant's plan on their traffic (Tr. 1500, 1835). Appellant's own traffic vice-president testified that by integrating Western's line into its service, appellant would obtain "new traffic" by diverting it from the Rock Island, Milwaukee, North Western and Burlington (Tr. 1307, 1304, 1305), and by short-hauling the Gulf, Mobile & Ohio, the Chicago & Eastern Illinois, the Illinois Central and the Wabash (Tr. 1303, 1275-76, 1281-82). Appellant would "actively solicit" this traffic to divert it from these lines, all of which are connections of Western (Tr. 1284, 1306). This would be a far cry from Western's present policy of working closely with all its connections.

Referring to its own claims of diversion, appellant says the Commission "dealt with appellant's detailed evidence of the damage it would suffer if Western were owned by Pennsylvania-Santa Fe in the following language" and then proceeds to quote one sentence from the report discussing diversion in general terms (J. S. 25). This statement is somewhat lacking in candor. The Commission devoted five full paragraphs of its report to a specific analysis of appellant's "detailed evidence" of diversion (J. S. 77-79).

Appellant argues further that the Commission found the standard routing conditions, generally prescribed in such cases, would be sufficient to protect the other carriers in the event of a Santa Fe-Pennsylvania acquisition and that they should, therefore, be equally sufficient to protect the other carriers in the event of acquisition by appellant (J. S. 25).



26). This argument ignores the fact that the Commission did not rely solely on the prescribed routing conditions to support its finding, but also on the plan for separate operation of Western under its present policies as embodied in the contract between Santa Fe and Pennsylvania and on the checks and balances inherent in control of Western by an eastern and a western carrier (J. S. 90; and see page 27, *infra*).

Appellant's application was fully considered in the light of the public interest and the particular circumstances of the case; and it was, in no sense, denied a comparative hearing.

## **2. THE FINDINGS ARE SUPPORTED BY THE EVIDENCE:**

Appellant's treatment of its contention that certain findings are not supported by substantial evidence is both sketchy and inaccurate (J. S. 18-21). None of the findings attacked are clearly identified by reference to the report, and what purports to be a paraphrase is often a distortion of the finding actually made. There is no analysis or even reference to all the evidence bearing on the particular findings attacked. Primary reliance is placed on general assertions and on statements taken out of context in an attempt to "manufacture" a supposed conflict.

Thus appellant says the finding that acquisition by Santa Fe and Pennsylvania will not jeopardize its traffic ignores appellant's "unchallenged" accounting studies and the testimony of the successful applicants as to their solicitation policies (J. S. 18). Far from ignoring them, the Commission analyzed in detail each category of appellant's "studies" of alleged diversion along with the evidence as

to solicitation policies and concluded there would be no substantial diversion (J. S. 77-79).

Appellant says the Commission justified the reasonableness of the purchase price for Western's stock on the ground that it was negotiated at arm's length and that appellant was willing to pay as much (J. S. 18); but fails to mention that these were only two of the several factors relied on by the Commission. Appellant says that it was willing to pay \$135 per share only because of the economies under its plan for sole control of Western, but fails to advise this Court that it offered to pay \$135 per share for a partial interest in Western if any other carrier were authorized to acquire control.<sup>9</sup>

Appellant implies that potential earning capacity was ignored, but the report shows that the Commission considered such factors as Western's earnings record, its excellent physical and financial condition, the valuation of its property for rate-making purposes, its progressive and able management and its strategic location which adds to its value as a long-term investment (J. S. 85-86). While it is true that comparisons of price-earnings ratios were not made, there was no evidence thereof in the record.

Appellant argues that the finding that Santa Fe and Pennsylvania would "permit" traffic through Peoria in competition with Chicago and St. Louis is unsupported by substantial evidence and contrary to the testimony of their presidents (J. S. 19-20). The use of the term "permit"—it was not used by the Commission—ignores the unchallenged finding that all but a very small part of the nation's traffic is routed by the shipper and that service is the most important factor influencing such routing (J. S. 76). We

9. See appellants' petition for reconsideration before the Commission, pp. 49, 50. The fact is that not only the Santa Fe, Pennsylvania and appellant, but four other railroads seeking participation in control under varying circumstances expressed their willingness to pay \$135 per share.

have already pointed out that the cooperation of Santa Fe and Pennsylvania with Western for over 30 years in providing fast through service via the Peoria gateway has played a major part in the development of Western's traffic (*supra*, p. 10). As to solicitation policy, the record shows and the Commission found that as owners of Western, Santa Fe will place Lomax on a parity with Chicago, and Pennsylvania, while continuing to solicit its long haul to St. Louis, will place Effner on a parity with Chicago, thus increasing the volume of traffic available for solicitation through Peoria (Tr. 221-22, 243, 378, 416, 1889-90; J. S. 75-76, 78). The testimony on this point by the president of Pennsylvania, when read in its entirety (see Tr. 337-38 as well as 281-82), fully supports the finding as does the testimony of its traffic vice-president (Tr. 378, 416). There is no conflict between this finding and the testimony of Santa Fe's president.<sup>10</sup> As the traffic manager of a large Pacific Coast shipper testified, Santa Fe has in recent years "tended to lean toward Lomax gateway about as freely as they do the Chicago gateway" (Tr. 793).

Appellant next attacks the finding that with the backing of Santa Fe and Pennsylvania and the assistance of their industrial departments, there are excellent prospects for locating new industries on Western's line (J. S. 90-91). But the record is replete with testimony that the ownership of Western by these two strong connections (Tr. 227, 485, 491, 524, 630, 642, 690, 715-16, 734-35, 915, 929, 941, 485, 491, 524, 630, 642, 690, 715-16, 734-35, 915, 929, 941, 952) and the assistance of their industrial staffs (Tr. 358-59, 364-65, 465, 643, 950) would provide an economic stimulus to industrial development along Western's line. Appellant says officers of Santa Fe and Pennsylvania testified that

10. In passing, it should be noted that Santa Fe's president did not, in fact, testify about the influence of the originating carrier. The only transcript reference to his testimony cited by appellant in this connection (Tr. 98 cited at J. S. 20) supports the finding as to the parity policy.

they would prefer to locate industries on their own lines, but the testimony of the officers referred to shows that both Santa Fe and Pennsylvania will have an incentive to assist in locating industries on Western. Santa Fe, because of its late entry into Chicago, is lacking in industrial property in that area and Pennsylvania, too, is short of industrial sites in Illinois (Tr. 225-26, 378-79).

Appellant attacks the finding with respect to car supply because Santa Fe and Pennsylvania were short of cars in 1955 (J. S. 20). Of course, all roads suffer from lack of cars during periods of general car shortage,<sup>11</sup> but that does not detract from the Commission's finding which was that Santa Fe and Pennsylvania would increase the supply of cars available to Western by seeing to it that Western's car ownership obligations were met in full either by having Western increase its car ownership or by increasing their own ownership sufficiently to take care of Western (J. S. 92). This is supported by the record (Tr. 50-51).

Equally insubstantial is the assertion that the findings regarding appellant's service west of Peoria and its proposed policy toward Western's connections contradict the only evidence in the record (J. S. 20). As to service the record shows (Tr. 1886, H-121) and the Commission found (J. S. 61, 78) that when appellant's line is used as an intermediate carrier between Western at Peoria and the Santa Fe at Nemo, the service is much lower than when traffic is interchanged directly at Lomax between Western and Santa Fe. As to appellant's policy, we have already discussed its plan to divert traffic from Western's other connections if it were authorized to acquire Western (*supra*, p. 16). Obviously this would not be "neutrality". For that matter, under appellant's plan to operate Western

11. Appellant's reports to the Association of American Railroads showed that it was short of cars for most of the year 1955 (H-120; Tr. 1327) and its president admitted that its car ownership was not up to A. A. R. recommendations (Tr. 1192).

as a part of its own line, there would be no "Western" to maintain a policy of neutrality. Appellant's line, now just one of Western's 16 connections, would automatically be favored.

The questions presented on this appeal show no need for a redefinition of the substantial evidence rule, as appellant suggests. The findings attacked are supported not only by substantial evidence, but by the weight of the evidence.

### **3. SECTION 10 OF THE CLAYTON ACT IS NOT A BAR TO THE PROPOSED ACQUISITION.**

Appellant says Section 10 of the Clayton Act has not been construed by this Court (J. S. 27). The answer is, as the District Court recognized, that a definitive construction of Section 10 is unnecessary (J. S. 47). The Commission has authorized Santa Fe and Pennsylvania to acquire joint control of Western by purchase of its stock. If, as appellant contends, such purchase by Pennsylvania Company is prohibited by Section 10 of the Clayton Act because there are directors common to its parent, The Pennsylvania Railroad Company, and Wilmington Trust Company, which holds title to the bulk of the stock as one of the co-trustees of the McNear estate, Pennsylvania Company is expressly relieved from that prohibition by Section 5(11) of the Interstate Commerce Act.<sup>12</sup>

Appellant, ignoring the fact that no stock has as yet been purchased, says the purchase of Western "had its roots" in a "direct unequivocal" violation of Section 10 and contends that the Commission lacks power to "con-

12. Section 5(11) provides that the Commission's authority is "exclusive and plenary" and that all parties to a transaction so authorized are "relieved from the operation of the antitrust laws and of all other restraints, limitations and prohibitions of law, Federal, State or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved" (49 U. S. C. §5(11); J. S. 108-109).

done" such a violation (J. S. 27). The short answer is that the authority of the Commission is "exclusive and plenary" and that the controlling consideration under Section 5 is the public interest in an adequate transportation system. Since the Commission has determined that the proposed acquisition is in the public interest, Section 5(41) removes any bars to its consummation.

Moreover, there is nothing to condone. Section 10 is not applicable to the facts of the present case. There is no conflict between the Commission's policy under Section 5(2), as reflected in its approval of the Santa Fe-Pennsylvania application, and the policy of Section 10 of the Clayton Act. Section 10 provides, in so far as here pertinent, that no common carrier "shall have any dealings in securities" to the amount of more than \$50,000 in any one year with another corporation with which it has officers or directors in common, except upon competitive bidding (15 U. S. C. § 20; J. S. 102-03). Its legislative history shows that the evil Congress intended to forbid was the exploitation of a carrier through improvident dealings in securities with another corporation in which its officers or directors were interested (51 Cong. Rec. 15943 (1914)). *Cf. Re Missouri Pacific R. Co.*; 13 F. Supp. 888 at 892-93 (E. D. Mo. 1935).

Here there have been no "dealings in securities." The Pennsylvania Company has purchased no securities from the Wilmington Trust. Prior to the transaction here involved Pennsylvania Company obtained a letter commitment from the trustees for purchase of 26 per cent of Western's stock, but this was later repudiated by the

13. Moreover, as the District Court pointed out, the Wilmington Trust was not acting for itself, but was functioning in a fiduciary capacity as one of the two co-trustees of the McNear estate and in the interest of the beneficiaries of the trust. Thus the situation was not one where the common directors could be enriched (J. S. 46).

trustees when appellant made a higher offer. Then Santa Fe, acting entirely in its own interest, topped appellant's offer and entered into a contract to purchase all the stock held by the trustees. It also contracted to purchase the shares of all the other holders of Western's stock. Finally, Santa Fe entered into a contract with Pennsylvania and Pennsylvania Company providing that the latter should acquire 50 per cent of the stock Santa Fe had contracted to purchase.<sup>11</sup>

Both contracts were expressly conditioned on approval of the transaction by the Commission and the instant application was accordingly filed. In approving the proposed acquisition, the Commission, pursuant to the requirements of Section 5(2), expressly found that the price to be paid for Western's stock was reasonable (J. S. 85-86). With such a finding, the possibility of the purchasing carrier's being milked, either directly or indirectly, by payment of an exorbitant purchase price to a corporation with which it has directors in common is eliminated and the objective of Section 10 of the Clayton Act has been met.

Appellant misses the point entirely when it cites *Central of Georgia Ry. Co. Control*, I. C. C. (Nov. 14, 1938). There the Frisco Railroad had already acquired control of the Central by stock purchase prior to seeking the approval of the Commission as required by Section 5(2) of the Interstate Commerce Act. The Commission denied the application on the ground that:

14. Appellant contends that Santa Fe was acting for Pennsylvania as well as for itself when it contracted to purchase the stock from the trustees, but the Commission specifically found that: "the Santa Fe is the only purchaser of the stock from the trustees and had no commitments to sell any of it to any other railroad. Before offering to sell a portion of the stock to Pennsylvania, several other joint control possibilities were considered and rejected" (J. S. 88). This finding is fully supported by all the testimony of record (Tr. 48, 65-69, 106-112; for corroboration, see H-83). It was given full credence by the hearing examiner (Proposed Report, sheet 26).



"If Frisco is permitted to retain the fruits of its unlawful conduct, and we sanction such conduct, which we consider to have been in flagrant disregard of the law, others will be encouraged to pursue a like course and to present a *fait accompli* for our approval. Obviously, such is not in accord with the intent of the statute, *i. e.*, that we pass upon 'proposed' acquisitions of control prior to their consummation, including the justness and reasonableness of the terms upon which such control is to be acquired. If the indicated practice were generally followed, the administration of the statute in the public interest would be seriously hindered, if not defeated."

The present case is entirely different. No stock has as yet been acquired. There is no *fait accompli*, approval of which would undermine the administration of the statute. The proposed acquisition has been submitted to and approved by the Commission in advance of consummation. The Commission has found the proposed acquisition to be in the public interest. It has passed on the terms of the transaction and has expressly found the purchase price to be reasonable. In doing so it has also provided full protection against the evil which Section 10 of the Clayton Act was designed to prevent—exploitation of the purchasing carrier through payment of an excessive purchase price for the stock.

#### **4. THE COMMISSION GAVE APPROPRIATE CONSIDERATION TO THE COMPETITIVE EFFECTS OF THE PROPOSED ACQUISITION.**

In its argument with respect to Section 1 of the Sherman Act and Section 7 of the Clayton Act appellant refuses to come to grips with either the holding of this Court in *McLean Trucking Co. v. United States*, 321 U. S. 67 (1944), or with the Commission's detailed findings as to the effect of the proposed acquisition on the competitive situation (J. S. 29-34).



In the *McLean* case, this Court held that the "basic determinants" of Commission action in proceedings under Section 5(2) of the Interstate Commerce Act must be the policies expressed in that Act and in the National Transportation Policy (321 U. S. at 79-80). Proposals under Section 5(2) are not to be measured by the general policies of the anti-trust laws; otherwise the provisions of Section 5(11) granting immunity from the anti-trust laws to transactions approved by the Commission would be meaningless (321 U. S. at 85-86). The policy of the anti-trust laws is not to be ignored, however; and it is, therefore, the duty of the Commission to consider the scope and effect of the curtailment of competition which will result from the proposed transaction along with its advantages in the light of the over-all transportation policy (321 U. S. at 86-87).

This is exactly what the Commission did, as the Court below pointed out (J. S. 50). The Commission found that:

"\* \* \* [T]he benefits to be derived from the operation of the Western under the control of the Santa Fe and the Pennsylvania as proposed will be in furtherance of the overall national transportation policy declared by the Congress, and its consummation will not unduly curtail competition in connection with the other carriers. Compare *McLean Trucking Co. v. United States*, 321 U. S. 67." (J. S. 81-82.)

This finding is supported by numerous subsidiary findings already discussed relating to the public advantages in the control of Western by Santa Fe and Pennsylvania, the benefits they receive from Western's line, and their past relationship with Western, including the part they have played in the development of interchange traffic which now accounts for about 70 per cent of Western's total interline traffic (*supra*, p. 10). A major part of the report deals specifically with the competitive effects of the proposed acquisition on other carriers (J. S. 75-82).

83-85, 90). After a general discussion of the factors affecting the routing of traffic, the Commission carefully analyzed the claims of traffic diversion and concluded that the proposed acquisition would not unduly curtail competition (J. S. 76-77, 77-81, 81-82).

This conclusion is firmly grounded in the economic self-interest of the Santa Fe and Pennsylvania. In the first place, as the report states, Western's success has been built on its present service and solicitation policies; and the best way for Santa Fe and Pennsylvania to assure a substantial return on their investment in Western is to see that Western's management is left free to continue them (J. S. 77).

Next—from the standpoint of service—the Commission emphasized the fact that Western's line is not the only route between the east and the west.<sup>15</sup> The Commission pointed out that if Western were to render poor service to its other connections, it would lose their interchange traffic entirely without any benefit to Santa Fe or Pennsylvania (J. S. 81). A number of large shippers testified that if Western rendered poor service to these other connections, the traffic would go to other available routes which do not include either Santa Fe or Pennsylvania (Tr. 596, 597, 599, 661-63, 690, 773-74).

But the most important factor protecting Western's other connections is the built-in system of checks and balances, which was described by the Commission as follows:

" \* \* No greater protection could be afforded to carriers interchanging traffic with Western than to have ownership divided equally between the largest connecting carrier in the east and the largest one in the west. Under this built-in system of checks and

15. In fact, Western's line is only one of a number of routes through the Peoria gateway. In addition, there are any number of available routes through Chicago and St. Louis which do not include either Pennsylvania or Santa Fe. (Tr. 649-70.)

balances, it is inconceivable for the Santa Fe to permit impairment of service or discriminatory solicitation with respect to eastern connections, or the Pennsylvania with respect to western ones \* \* \*." (J. S. 90.)

Thus the Commission's finding that the proposed acquisition would "not unduly curtail competition" is based on practical considerations reflecting the realities of competition in the transportation field.<sup>16</sup> Appellant's argument assumes that the findings are inadequate because they do not deal with the competitive situation in terms of the anti-trust laws. Appellant asserts, without any support authority, that the proposed acquisition would "admittedly" violate the anti-trust laws,<sup>17</sup> and points out that the Commission "did not mention either Section 1 of the Sherman Act or Section 7 of the Clayton Act" (J. S. 30). But the

16. The "built-in system of checks and balances" works in two ways: First, Pennsylvania as an eastern road receives valuable traffic via Western from the latter's connections on the west, such as the Rock Island, Burlington and appellant's line. Santa Fe likewise receives important traffic via Western from eastern roads, such as Nickel Plate and the New York Central. Neither would want Western to be operated in such a way as to lose that traffic (Tr. 53, 365-66, 377).

Second, it is a well-known fact that railroads serving the east-west gateways cannot afford to favor one connection to the detriment of others. This was conceded by appellant's freight traffic manager (Tr. 1215) and is reflected in the policy of the Nickel Plate (Tr. 1503-04). It was recognized by the Commission in *Chicago, Burlington & Quincy R. Co. Control*, 271 J. C. C. 63, 154 (1948).

It would be "suicidal" for Santa Fe and Pennsylvania to join in any attempt to divert traffic from Western's other connections to Santa Fe-Western/Pennsylvania routing. If they attempted this, Santa Fe would antagonize all its other eastern connections and Pennsylvania would antagonize all its other western connections, including not only the lines with which each bridges traffic over Western, but also their connections at other east-west gateways which do not connect with Western (Tr. 223-24, 243).

17. The statement (J. S. 30) that the acquisition would link "two empires," *i.e.*, the Pennsylvania and Santa Fe, overlooks the finding as to the effect of the checks and balances inherent in control by an eastern and a western railroad.

*McLean* case makes it clear that this is not required. The Commission's report, which was sustained in that case, did not discuss the competitive situation in terms of the anti-trust laws and made no reference to the Sherman or Clayton Acts (*Associated Transport, Inc.—Control and Consolidation*, 38 M. C. C. 137 (1942)). In that case, just as in the present case, the Commission discussed the competitive situation in practical and concrete terms reflecting the evidence of record and its "past experience with transportation operations and analogous transactions." (321 U. S. at 89.)

**5. APPELLANT WAS ACCORDED AN ADEQUATE REVIEW  
BY THE DISTRICT COURT.**

The charge that the District Court abdicated its function is without merit (J. S. 34-35). A reading of the opinion below will show that the court carefully considered the questions raised, followed accepted standards of review, and merely refused to substitute its judgment for that of the Commission on matters committed by law to the latter.

**CONCLUSION.**

We submit that the foregoing arguments show that the District Court ruled correctly on the questions sought to be presented on this appeal, and that the questions are so unsubstantial as not to need further argument. Accordingly, the motion to affirm should be granted.

Respectfully submitted,

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December 30, 1958.

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MOTION 10

AFFIRM ON BEHALF

OF THE STATE OF

ILLINOIS

NO 12

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1958.

No. [REDACTED] 12

THE MINNEAPOLIS & ST. LOUIS RAILWAY  
COMPANY,

*Appellant,*

*against*

UNITED STATES OF AMERICA, INTERSTATE  
COMMERCE COMMISSION, ET AL.,

*Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF MINNESOTA.

**MOTION TO AFFIRM  
ON BEHALF OF THE STATE OF ILLINOIS.**

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1958.

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**No. 552.**

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THE MINNEAPOLIS & ST. LOUIS RAILWAY  
COMPANY,

*Appellant.*

*against*

UNITED STATES OF AMERICA, INTERSTATE  
COMMERCE COMMISSION, ET AL.,

*Appellee.*

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF MINNESOTA.

---

**MOTION TO AFFIRM.**

---

The State of Illinois, appellee in the above-entitled case, pursuant to Rule 16, paragraph 1(c) of the Revised Rules of the Supreme Court, respectfully moves to affirm on the ground that the decision of the court below is wholly correct, in accord with all relevant authority and that the questions raised by the Appellant are so unsubstantial as not to require further argument.

## STATEMENT.

---

This controversy, while directly involving the judicial review of an order of the Interstate Commerce Commission, basically concerns the question of the acquisition by the Pennsylvania and Santa Fe of the stock of Western<sup>1</sup> under the statutory standards of Sec. 5 of the Interstate Commerce Act (49 U.S.C. Sec. 5). That section requires that any acquisition "be consistent with the public interest." While initially there were four alternatives presented to the Interstate Commerce Commission,<sup>2</sup> the issue has now been narrowed to two, namely: (1) does the public interest lie in preserving Western's existing transportation function as a bridge line through the Peoria Gateway by stock ownership by Western's two largest connecting lines, or (2) does the public interest lie in making the future operation of Western a part of appellant's railroad and substantially altering Western's present operation and transportation function?

The State of Illinois has a substantial interest in this proceeding. Western lies almost entirely within Illinois. Its executive office, yards and shops are located in Illinois. Western's employees reside in Illinois. Although Western is primarily a bridge-line, it provides an essential transportation service upon which the communities along its line

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1. The interested railroads will be referred to hereinafter as follows: Toledo, Peoria and Western Railroad Company as Western, The Pennsylvania Railroad Company as Pennsylvania, and The Atchison, Topeka and Santa Fe Railway Company as Santa Fe.

2. These alternatives are described at page 64 of the Jurisdictional Statement. They included: (1) joint control by Santa Fe-Pennsylvania, (2) sole control by appellant, (3) multiple ownership, and (4) denial of both applications or dismissal of appellant's applications.

are completely dependent.<sup>3</sup> Its function as a bridge-line provides the communities along its line a type of service which would otherwise not be economically justified. This is particularly true as to the line west of Peoria.

The interests of the States of South Dakota and Minnesota involved in this proceeding are, at best, remote and indirect. They are based upon the unwarranted assumption that appellant's traffic would be diverted under Santa Fe and Pennsylvania's control of Western and upon the equally unwarranted assumption that appellant's absorption of Western would result in a consequential benefit to them. Unlike the conditional nature of these interests, the interests of the State of Illinois are directly and immediately affected by the admitted loss of existing benefits inherent in appellant's absorption of Western into its operations. Such losses are involved in the alteration of Western's existing transportation function, the abandonment of Western's executive offices, yards and shops at Peoria, and the effectuation of substantial reductions in personnel and cutbacks in spending within the State of Illinois.

Illinois has a direct interest in the economy of the area of Central Illinois served by Western. That interest is manifest in the continued agricultural and industrial development of that area, in the economy of the City of Peoria and the Peoria area, the continued present and further development of railroad service to the communities along Western's line, the development of Peoria as a major rail

3. All of the communities along the line of Western intervened in the proceedings before the Interstate Commerce Commission and the United States District Court in support of Santa Fe-Pennsylvania control. These communities are: the City of Peoria, the City of East Peoria, the City of Bushnell, the City of Canton, the City of LaHarpe, the Village of Lomax, the City of Warsaw, the City of Forrest, the City of Fairbury, the City of Gridley, the City of Gilman, the City of Sheldon, the City of Watseka, the City of Eureka, the Village of Secor, the City of Washington and the City of Chenoa.

gateway, and finally but of major consequence in Western's employees. Each of these interests are directly related to the preservation of Western's existing transportation function and its continued development as a bridge-line in transcontinental traffic. The disadvantages inuring to each of these points of interest by altering Western's existing transportation function under appellant's proposal is apparent and provided the basis for the State of Illinois' participation in this proceeding before the Interstate Commerce Commission, the District Court and now the State's participation in this appeal.

In dealing with the questions put by appellant, the State of Illinois will confine its argument to only the questions which relate to the interest of the State.

## ARGUMENT.

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### I.

#### **THE ADEQUACY AND SUBSTANTIALITY OF THE FINDINGS.**

##### **A. The Adequacy of the Findings.**

First: Appellant argues that its absorption of Western and the consequent realization of operating economies and the institution of improved service via the combined property "entitled" it to the Commission's approval in preference to the Santa Fe-Pennsylvania plan which proposed no large-scale economies or changes in service. Thus only appellant's plan is said to have "conformed" to Section 5 of the Interstate Commerce Act and the National Transportation Policy. What appellant is saying, in effect, is that under the governing standards of Section 5 and the objectives of the National Transportation Policy, the Commission is required to approve a proposal involving substantial economies and "improved" service regardless of the consequences of such proposals and irrespective of the merits of another proposal which does not involve the achievement of large scale economies or new service. This is simply not so.

Appellant's argument ignores both the fact that the application of the standards of Section 5 may vary with the circumstances of each proceeding, and that the several objectives of the National Transportation Policy may, in their application to any proceeding, be mutually exclusive. The argument, furthermore, ignores that the Commission expressly found that the changes in service proposed by appellant would be "extremely harmful" to other carriers<sup>4</sup>

4. Juris. St., pp. 72-73.

and that the economies which might be achieved would be effected at the expense of Western's employees." Both of these findings illustrate that, in evaluating a proposal such as this, the scope of the Commission's discretion under Section 5 is broader than appellant suggests. Section 5(2)(c) of the Interstate Commerce Act, specifically directs the Commission to give weight to the effect of a proposal upon the interests of the carrier employees affected.<sup>5</sup> Such consideration is directed to the merits of the proposals since labor is part of the "whole public" included in the concept of the public interest under Sec. 5.<sup>7</sup> The State of Illinois has a special interest in the 256 families who would be displaced through Western's absorption by appellant, and Illinois' participation in the proceeding before the Commission reflects this concern. The Commission weighed the possible economies against the interests of Western's employees and concluded that the employees' interests, the interests of the communities, shippers and other parts of the public affected by the proposal outweighed the possible achievement of economies under the circumstances presented in this proceeding.

In evaluating a proposal such as this, the Commission is further directed under Section 5(2)(c) to give weight to the effect of the transaction upon adequate transportation service to the public. In the application of this standard,

5. Juris. St., pp. 73-74.

6. It should be noted that the Railway Labor Executive Association intervened in the proceeding before the Commission in support of Santa Fe-Pennsylvania control of Western on the ground that the interests of labor would be fully recognized under such control.

7. In *Florida East Coast Railway Company Reorganization*, 267 I. C. C. 295 (1947) at page 325, the Commission said: "In cases heretofore decided, we have stated, that the public interest embraces the whole public and the public as a whole, and that the interests of employees in changes of management, ownership, or operation of companies by which they are employed are of public as well as private interest."

the Commission also found that the value of the new service routes proposed by appellant via the combined operation would be outweighed by the adverse effect which the institution of such routes would have upon other carriers and the ability of such carriers to continue to provide adequate transportation service to the public. This consideration also underlies the Commission's basic finding that the public interest requires that Western's existing transportation function be retained. Sec. 5, on its face, and its application by the Commission in this proceeding, in accordance with the National Transportation Policy, indicates clearly that the "public interest" is not limited to the effectuation of economies and new service regardless of the consequences of such proposals.

Second: Appellant argues that there were no ultimate, basic or factual findings contained in the Commission's report sufficient to justify approval of the Santa Fe-Pennsylvania proposal or rejection of appellant's plan. An objective analysis of the report, however, indicates that findings were made as to all of the material issues, that such findings are sufficient to satisfy the requirements of Section 8(b) of the Administrative Procedure Act, 5 U. S. C. Sec. 1007, and that the findings reveal the "essential basis" of the Commission's decision in a manner which adequately lends the decision to effective judicial review. *Luckenbach S. S. Co., Inc. v. United States*, 122 F. Supp. 824, 827 (D. C. S. D. N. Y., 1954); *Capital Transit Co. v. United States*, 97 F. Supp. 614, 621 (D. C. D. C., 1951); *Alabama G. S. R. Co. v. United States*, 340 U. S. 216, 227-28 (1951).

The ultimate finding is contained in the Commission's conclusion that the Santa Fe-Pennsylvania proposal to preserve Western's existing transportation function was "consistent with the public interest," (the statutory standard of Sec. 5(2)) and that the benefits to be derived

from the operation of Western under Santa Fe-Pennsylvania's proposal would be "in furtherance of the overall National Transportation Policy declared by the Congress."<sup>9</sup> The basic finding was that the public interest required that Western's existing transportation function "in all respects" be preserved.<sup>10</sup>

The need for retaining Western's existing transportation function as expressed in the basic finding, in turn, rests upon the following subsidiary evidentiary finding: (1) that Western occupies a geographically strategic position;<sup>11</sup> (2) that Western performs a strategic function as an overhead carrier operating through the alternative Peoria Gateway, bypassing the congested terminals of Chicago and St. Louis;<sup>12</sup> (3) that Western's function as an overhead carrier and its existing traffic policies of (a) maintaining strict neutrality between its sixteen connecting lines and (b) attempting to participate in a haul of traffic no matter how slight, are a natural result of and are directly related to Western's strategic geographic position and account for Western's success;<sup>13</sup> (4) that, as a consequence of Western's strategic position, the function which it serves, and its traffic policies, Western has assumed national importance in the Nation's railroad system as a "vital direct link" supplying the "short-line connection" as to east west traffic;<sup>14</sup> (5) that Western's existing function and its traffic policies thus make available Western's natural advantages to the maximum number of its connecting railroads;<sup>15</sup> and that (6) the retention of Western's ex-

9. Juris. St., pp. 81-82.

10. Juris. St., p. 89.

11. Juris. St., p. 60.

12. Juris. St., p. 60.

13. Juris. St., p. 60.

14. Juris. St., p. 89.

15. Juris. St., p. 89.



isting transportation function and the preservation of its existing policies have significant consequences both to the railroad industry as well as the public generally.<sup>16</sup> The Commission found furthermore, that, with the exception of appellant and the States of South Dakota and Minnesota, its conclusion that the retention of Western's existing function was essential to the public interest was shared by all of the parties to the proceeding, including all of the railroad intervenors, all of the communities served by Western and all of the shippers who appeared in the proceeding as witnesses.<sup>17</sup> These ultimate, basic and evidentiary findings are all directly related to the standards contained in Sec. 5 and to the objectives of the National Transportation Policy.

Having before it two proposals, only one of which was predicated upon the retention of Western's existing transportation function, it would have been unnecessary for the Commission to make any additional evidentiary findings other than to give expression to the fact that the appellant's plan "unequivocally" contemplated the abandonment of Western's existing transportation function, and that the Santa Fe-Pennsylvania plan coincided with the basic finding and otherwise complied with the public interest.<sup>18</sup> The Commission went a great deal further in making findings, however, and dealt with both proposals on the merits. These findings will be discussed in the reply to the second question put by appellant relative to the alleged failure of the Interstate Commerce Commission to accord a comparative hearing.

16. Juris. St., p. 89.

17. Juris. St., p. 72.

18. Juris. St., p. 71.

## B. Substantiality of the Evidence.

Third: Appellant argues that the findings which were made are not supported by substantial evidence. In attempting to obtain a judicial re-evaluation of the weight to be accorded the evidence relating to these findings, appellant distorts both the nature of the findings and the record. In an effort to manufacture conflicts between the findings and the record, appellant uses statements of the officers of Santa Fe and Pennsylvania which are taken out of context in which they appear and, in effect, puts in issue the credibility of those officials.

One of the findings attacked by appellant is that industrial development along Western's line will be furthered as a consequence of Santa Fe-Pennsylvania's control. Another attacked finding which is closely related to industrial development is that under Santa Fe-Pennsylvania's control, Western would have an increased opportunity to secure traffic now moving via other gateways. The State of Illinois has a substantial interest in each of these objectives. The development of the Peoria Gateway and the stimulus to further industrial development along Western's line inherent in Santa Fe and Pennsylvania's control of Western provide the principal bases upon which the municipalities and business associations<sup>19</sup> along Western's line unanimously predicated their support for the Santa Fe-Pennsylvania proposal. The witnesses representing each of these interests recognized that the very fact of Santa Fe and Pennsylvania's owner-

19. The municipalities affected by this proceeding are named in the footnote at page 3, *supra*. In addition to the municipalities along Western's line, various civic and business associations also intervened in support of Santa Fe and Pennsylvania's control of Western. They included the Peoria Association of Commerce and Industry, the Peoria Junior Chamber of Commerce, Bushnell Chamber of Commerce, Canton Chamber of Commerce, LaHarpe Golden Rule Club, Keokuk Chamber of Commerce and Warsaw Chamber of Commerce. No mention is made of these interests in the Jurisdictional Statement.

ship of Western would itself provide a strong inducement for the location of new industries in the area it serves (R. 485, 491, 524, 630, 642, 690, 715-16, 734-35, 915, 929, 941, 952). The achievement of this objective, therefore, is not dependent upon anything which either the Santa Fe or Pennsylvania might do in connection with the location of specific industries along Western.

Appellant, moreover, distorts both the finding and the record regarding industrial development by suggesting that a conflict exists between the finding and the testimony of the officials of Pennsylvania-Santa Fe that they would locate on Western only such industries as they could not locate on their own lines. The Commission's finding does not suggest that either Santa Fe or Pennsylvania will treat Western on a parity with their own lines in the location of industries.<sup>20</sup> The finding merely reflects the fact that the industrial development departments of both roads will assist Western in locating industries on its line. This is based in part upon the fact that both Santa Fe and Pennsylvania are short of available industrial sites in Illinois. There is substantial evidence to support this finding (R. 358, 378-79, 49, 225-26, 227, 364-65).

Appellant's argument regarding the finding concerning the development of the Peoria Gateway under Santa Fe and Pennsylvania's control of Western involves a similar distortion of both the record and the findings. Appellant's statement of the finding is completely distorted in that it assumes that the movement of traffic over Western's route is detrimental to the interests of Santa Fe and Pennsylvania. The Commission made no such finding. The Commission did find that, based upon (1) both Santa Fe and Pennsylvania's past solicitation policies of working closely with Western,<sup>21</sup> (2) the mutu-

20. Juris. St., pp. 90-91.

21. Juris. St., p. 75.

ality of interests among Santa Fe, Pennsylvania and Western in the Peoria Gateway,<sup>22</sup> (3) the cooperation accorded Western in coordinating schedules and services,<sup>23</sup> and (4) the economies of Santa Fe and Pennsylvania's control,<sup>24</sup> Western would have an increased opportunity to secure traffic moving via other gateways.<sup>25</sup> In addition to this the detailed discussion of the competitive consequences of Santa Fe and Pennsylvania's control of Western fully supports this finding and provides adequate assurance that Santa Fe and Pennsylvania would not and could not stifle competition via the Peoria Gateway.<sup>26</sup>

## II.

### **THE FAILURE OF THE INTERSTATE COMMERCE COMMISSION TO ACCORD A COMPARATIVE HEARING.**

Appellant argues that the Commission failed to "comparatively" consider its proposal for its acquisition of Western. This question is really a restatement of the first question put by appellant relative to the adequacy of the findings. As shown in the reply to that question, the Commission made adequate ultimate and basic findings which were supported by evidentiary findings. All of these findings established that the public interest required the retention of Western's existing transportation function. Because of the nature of the two proposals, it was unnecessary for the Commission to make any additional findings except to reflect the fact that appellant's proposal was inconsistent with the achievement of this objective while the Santa Fe-Pennsylvania's proposal was in accord with it and was otherwise consistent with the public interest.

22. Juris. St., p. 75.

23. Juris. St., p. 60.

24. Juris. St., p. 75.

25. Juris. St., p. 75.

26. Juris. St., pp. 75-82.

Appellant's and Santa Fe-Pennsylvania's proposals were wholly dissimilar in their nature. This proceeding was, therefore, quite unlike the case upon which appellant relies, involving multiple mutually exclusive applicants in a licensing proceeding before the Federal Communications Commission, where the scope of the variance on the merits of the proposals is exceedingly narrow. In proceedings of that nature, it may be necessary for the administrative body to make extensive findings on the merits of the proposals in order to provide a basis for effective judicial review. Such a need for findings on the merits of the proposals does not exist in a proceeding such as this where (1) the objective sought to be attained by the administrative body is arrived at wholly apart from the specific context of any one of the proposals, (2) the basis for arriving at the objective is expressed in adequate findings, (3) the objective falls within the scope of the governing legislative standards, and (4) when the objective is related to the specific context of the several alternative proposals before the administrative body, only one of the proposals is consistent with the attainment of that objective.

As hereinbefore pointed out, the Commission made adequate findings to support the ultimate objective that the transaction which it approved was "consistent with the public interest." However, not only were the findings on the merits of the Santa Fe-Pennsylvania proposal set out but the Commission made findings on the merits of appellant's proposal. Appellant affirmatively predicated its case upon the achievement of economies which allegedly would result from its absorption of Western, and upon the establishment of new service routes via the combined properties. The Commission made specific findings on the merits of both of these proposals. It found that the economies would be achieved at the expense of labor<sup>27</sup>

27. Juris. St., pp. 73-74.

and that the proposed new service would be harmful to other carriers.<sup>28</sup> The extensive consideration accorded appellant's affirmative proposals is reflected in the detailed analysis of its plan for control contained in the report.<sup>29</sup> Appellant also predicated its proposal, in part, upon the alleged diversion of its traffic under Santa Fe and Pennsylvania's control of Western. This too was adequately considered by the Commission as is evident by the detailed findings contained in the report.<sup>30</sup>

Thus it is apparent from the findings that the Commission fully considered the merits of both proposals in arriving at its conclusion concerning the public interest.

### CONCLUSION.

The motion to affirm should be granted. The grounds upon which the District Court's decision rests are fully sustained on appeal.

Respectfully submitted,

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28. Juris. St., pp. 72-73.

29. Juris. St., pp. 70-75.

30. Juris. St., pp. 75-79.

MOTION TO DISMISS CAN  
BE MADE BY MUNICIPALITIES  
AND SHIPPERS ALONG THE LINE  
AT TOLEDO, PEORIA, WESTERN  
RAILROAD COMPANY

NO 12

**FILE COPY IN THE  
SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1958.

No. [REDACTED] 12

THE MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY,  
APPELLANT

VS.

UNITED STATES OF AMERICA, INTERSTATE  
COMMERCE COMMISSION ET AL.,  
APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MINNESOTA.

**MOTION TO AFFIRM ON BEHALF OF MUNICIPAL-  
ITIES AND SHIPPERS ALONG THE LINES OF  
TOLEDO, PEORIA & WESTERN RAILROAD  
COMPANY.**

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**IN THE  
SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1958.

No. 552.

THE MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY,  
APPELLANT,

VS.

UNITED STATES OF AMERICA, INTERSTATE  
COMMERCE COMMISSION ET AL.,  
APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MINNESOTA.

**MOTION TO AFFIRM ON BEHALF OF MUNICIPAL-  
ITIES AND SHIPPERS ALONG THE LINES OF  
TOLEDO, PEORIA & WESTERN RAILROAD  
COMPANY.**

These intervening appellees, pursuant to Rule 16,  
paragraph 1(c) of the Revised Rules of the Supreme Court,

1. The City of Peoria, Illinois; the City of East Peoria, Illinois; the Peoria Association of Commerce; the City of Bushnell, Illinois; the Bushnell Chamber of Commerce; the City of Canton, Illinois; the Canton Chamber of Commerce; the City of LaHarpe, Illinois; the LaHarpe Golden Rule Club; the Village of Lomax, Illinois; the City of Keokuk, Iowa; the Keokuk Chamber of Commerce; the Keokuk Bridge Commission; the City of Warsaw, Illinois; the Warsaw Chamber of Commerce; the City of Forrest, Illinois; the City of Fairbury, Illinois; the City of Gridley, Illinois; the City of Gilman, Illinois; the City of Sheldon, Illinois; the City of Watseka, Illinois; the City of Eureka, Illinois; the Village of Secor, Illinois; the City of Washington, Illinois; and the City of Chicago, Illinois. All of said appellees will hereinafter be referred to as "these intervening appellees".

move that the judgment of the United States District Court for the District of Minnesota be affirmed on the ground that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

## **STATEMENT OF THE CASE.**

### **1. Intervening Appellees Identified:**

This motion is submitted jointly on behalf of the 18 municipalities, the 6 civic and business associations and the Keokuk Bridge Commission of Keokuk, Iowa, which are referred to by appellant in its description of the proceedings before the Commission as "certain other bodies" which intervered in support of Santa Fe and Pennsylvania's control of Western.<sup>2</sup> Collectively, these intervening appellees represent virtually every municipal, civic, business and shipping interest along the lines of the Toledo, Peoria & Western Railroad Company.

### **2. Interests of Intervening Appellees:**

Because of appellant's inadequate characterization of the scope of the interests represented by these intervening appellees, it would appear desirable to define these interests. The interest of these intervening appellees in this proceeding evolves out of the concern which they share for the economic and commercial welfare of the area in Central Illinois served by Western, of which the City of Peoria is the commercial and industrial center. Specifically, the interests of these intervening appellees include

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<sup>2</sup> Jurisdictional Statement, p. 11

<sup>3</sup> Hereafter called Western. The Atchison, Topeka and Santa Fe Railway Company will be referred to herein as Santa Fe and the Pennsylvania Railroad Company will be referred to as Pennsylvania.

(1) their interest in preserving and developing adequate transportation service in this area, (2) their interest in maintaining and extending the total transportation plant available in the Peoria area, (3) their interest in the welfare of the employees in the transportation industry in this area, (4) their interest in the continued further industrial development of the Peoria area and in the area along the line of Western, the achievement of which objective is so closely related to transportation, including (a) the location of new industry, (b) expansion of existing plant and (c) diversification of industrial lines, and (5) their broad interest in the economic stability of the area generally which is so vitally affected by a basic industry such as transportation.

### **3. Position of Intervening Appellees:**

These intervening appellees intervened in Interstate Commerce Commission Finance Docket 18991 in support of the application of Santa Fe and Pennsylvania for joint control of Western. They intervened in Interstate Commerce Commission Finance Docket 19086 in opposition to appellant's application for control of Western. These intervening appellees opposed at the hearing, upon brief, exceptions and oral argument before the Commission and on appeal to the District Court, appellant's proposal and the request of certain railroads for multiple ownership.

4. It should be noted that the Railway Labor Executives Association intervened in support of joint control by Santa Fe and Pennsylvania on the ground that the interests of Western's employees would be given full recognition under their proposal.

5. Direct participation in control was sought by the New York, Chicago & St. Louis Railroad Company and the Chicago, Rock Island & Pacific Railroad Company; also, Chicago, Burlington & Quincy Railroad Company and Wabash Railroad Company applied for participation in control in the event the Commission extended control to the two former railroads.

#### **4. Basis for Position:**

These parties supported the application of Santa Fe and Pennsylvania for joint control of Western on the following grounds:

1. It will insure continued separate operation of Western under its present management with its executive offices and terminal facilities located in the Peoria area;

2. It will preserve intact all of the positive benefits accruing to these communities by the continued maintenance and preservation of Western's basic function as an important link in transcontinental traffic;

3. It will best assure the continued growth and development of Peoria as a railroad gateway;

4. It will best assure the continued growth and development of Western;

5. Such control and the benefits which will inevitably flow as a consequence of ownership by Santa Fe and Pennsylvania will provide the greatest single impetus which this area could receive to an expanding economy by the further industrial development of the Peoria area as well as the entire area served by Western.

These parties opposed appellant's application for control of Western on the following grounds:

1. Such control would forever foreclose to the Peoria area the realization of the positive benefits described above which would flow as a consequence of the joint control by Santa Fe and Pennsylvania and the continued development of Western as a major link in transcontinental rail traffic;

2. Such control admittedly would visit serious economic consequences upon these communities and

particularly the Peoria area by a permanent loss of an annual payroll of over one and one quarter million dollars and a loss of employment affecting 256 families:

3. Such control would result in a substantial reduction of the total transportation plant and facilities available to the Peoria area by major abandonments of yards; shops and offices;

4. Such control, with the curtailment of existing transportation plant and personnel and particularly the shift in orientation of Western's function as a major link in transcontinental traffic, would make the Peoria area and the area served by Western less attractive as a site for plant expansion and for the location of new industry.

**5. Significance of Participation by the Parties Herein:**

The complete unanimity of opinion by those most vitally affected by a change in Western's control is a highly significant factor in this proceeding. Appellant cannot dismiss the importance of this fact in its reply, by contending that the interests of the parties herein reflect the typical chamber of commerce reaction to a business merger which may be disadvantageous to a community. Too broad a range of interests, both geographic and economic, are involved herein. The Commission, in defining the concept of the public interest under Section 5(2) has stated that "consideration must be given to the public affected by the transaction and the effect of the proposal upon all parts of the public which would be so affected". *C., B. & Q. Railroad Control*, 271 I.C.C. 63, at p. 146 (1948); *Detroit Toledo & Ironton R. Co. Control*, 275 I.C.C. 455, 488 (1950). These intervening appellees constitute that part of the public which is most directly affected by the transaction.

## ARGUMENT.

The questions involved in this proceeding include matters lying peculiarly within the domain of transportation law with which these intervening appellees are not prepared to deal. We will leave, therefore, to counsel for the government, Santa Fe and Pennsylvania those matters which might be more competently treated by them. One area wherein these intervening appellees do, with some degree of justification, feel a sense of special competency lies in the questions which have been raised concerning the alleged invalidity of the Commission's order on the ground that no benefits to the public interest contemplated by the Interstate Commerce Act or the National Transportation Policy will flow from the proposed acquisition by Santa Fe and Pennsylvania of Western, and in the alleged invalidity of the findings respecting the specific benefits to the public interest which will inure from such control. For it is precisely in this respect that the parties herein, the cities, shippers and business associations along the lines of Western, have a special interest in the outcome of this proceeding. This is the very basis upon which these intervening appellees predicated their support of Santa Fe-Pennsylvania control and justified their opposition to appellant's control. Our reply to the Jurisdictional Statement will, therefore, be limited to these issues.

### I.

#### **The Lack of Substance As to the Questions Put by Appellant Regarding the Adequacy of the Findings.**

Appellant misconceives the function of judicial review of an administrative decision when it suggests that it would



be "entitled" to the Commission's decision "because of the grounds upon which appellant rested its proposal." This fundamental misconception of the function of the District Court underlies its entire Jurisdictional Statement. It has been clearly established that the reviewing court must review the decision on the basis of the grounds upon which it rests and not upon any other or alternative grounds or standards in inquiring into the adequacy of the findings. If substantial evidence supports such findings, the court cannot substitute its own judgment even where it may not have made a similar decision. *I. C. C. v. Union Pacific R. Co.*, 222 U.S. 541 (1912).

The purpose of providing adequate findings is to afford a basis for the exercise of judicial review. In order for the court to discharge its function, it is only necessary that the "essential basis" of the administrative decision be set out in order that the factual and legal basis upon which it has proceeded is "amply clear". *Capital Transit Co. v. U. S.*, 97 F. Supp. 614, 621 (D.C.C. 1951). In testing the adequacy of the findings upon the basis of the grounds upon which the decision rests, it seems abundantly clear that no reasonable question can be said to exist with respect to the adequacy of the findings relative to the basis upon which the Commission approved the Santa Fe and Pennsylvania's plan and rejected appellant's proposal.

The findings upon which the decision rests are related both to the standards of Section 5 and the National Transportation Policy. Appellant's proposal was thus rejected on the ground (1) that it contravened the public interest in the continued retention of Western's existing policies, (2) that it contravened the interests of labor under Section

6. Jurisdictional Statement, p. 14.

7. Commission's Report, Jurisdictional Statement, p. 71.

5(2)(c),<sup>8</sup> and (3) that its traffic policies would harm other carriers" and thus be opposed to the consideration the Commission must accord this factor under Section 5 (2)(c). This is consistent with the interests of appellees, the shippers, municipalities and business associations along Western's line. It was also consistent with the interests of labor, the other railroad intervenors, and the off-line shippers who use Western as a link in transcontinental traffic. No purpose would be served by a detailed outline of the Commission's findings upon which approval of Santa Fe and Pennsylvania control was predicated. These findings underlie the entire report.

## II.

### **The Lack of Substance As to the Question Put by Appellant Regarding the Failure of the Interstate Commerce Commission to Accord Appellant a Comparative Hearing.**

A fair reading of the Commission's report in its entirety indicates clearly the lack of substance in appellant's argument that it was not accorded a comparative hearing.<sup>9</sup> Appellant ignores what the Commission did as reflected in its report and undertakes to attack the subjective mental processes by which the decision was reached. Thus, appellant argues that the Commission reached its ultimate conclusion "at the outset" without a comparative consideration of appellant's proposal.<sup>11</sup> Appellant then inconsistently argues that in its evaluation of the two proposals, the Commission applied "different standards".<sup>12</sup>

8. Commission's Report, Jurisdictional Statement, p. 74.

9. Commission's Report, Jurisdictional Statement, p. 73.

10. Jurisdictional Statement, pp. 21-26.

11. Jurisdictional Statement, p. 23.

12. Jurisdictional Statement, p. 25.

These intervening appellees cannot reply to such an argument based as it is upon the subjective mental processes of the Commission. These intervening appellees can only deal with the objective standards reflected in the report. By these objective standards, it is clear that (1) the Commission preliminarily defined its function to include a comparative evaluation of both applications on the merits,<sup>13</sup> (2) the Commission did, in fact, fully discuss and evaluate all of the principal aspects of appellant's proposal on its merits,<sup>14</sup> and (3) that the Commission made specific findings on the merits of appellant's proposal.<sup>15</sup>

The Commission initially undertook to define its function in this proceeding to include a comparative evaluation of both applications in order to arrive at a decision as to which of the alternatives before it was most consistent with the public interest.<sup>16</sup> The Commission's function was defined as follows: (1) to arrive at a standard of public interest; (2) in arriving at a standard of the public interest, to analyze each application in relation to the other, as well as to the other interests; and (3) then determine which of the alternative plans of control most nearly approximates that standard.

Having first defined its function to include a comparative consideration of appellant's proposal, the Commission then proceeded to evaluate all of the aspects of appellant's proposal. The report shows that, in arriving at a standard of the public interest, the benefits and detriments of both applications were thoroughly considered.

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13. Commission's Report, Jurisdictional Statement, p. 65.

14. Commission's Report, Jurisdictional Statement, pp. 70-75.

15. Commission's Report, Jurisdictional Statement, pp. 70-75.

16. Commission's Report, Jurisdictional Statement, p. 65.

This is evident by the extended discussion of appellant's proposal which followed. Appellant, nevertheless, asserts that the Commission ignored the "criteria of economies and efficient service" which have been deemed to relate to Section 5 and the National Transportation Policy. Since the Commission reached a decision that a consolidation or unification of Western was not in the public interest, it was unnecessary for the Commission to find that these considerations, upon which appellant relies, constituted the determinative elements of the public interest involved in this proceeding. To assert, as appellant has, that these objectives constitute the exclusive criteria of Section 5 and the National Transportation Policy is to foreclose the possibility of the Commission's approval of an acquisition of control under Section 5 of any proposal which does not contemplate a merger or unification.

The fact is, however, that the Commission made specific findings in this proceeding that the two criteria which were relied upon by appellant would, under the circumstances of this proceeding, be opposed to the public interest. Thus, the Commission found that most of the estimated economies would be secured at the expense of Western's employees.<sup>17</sup> The Commission found, furthermore, that the service policies which would be adopted under unified operations would be "extremely harmful to other carriers".<sup>18</sup>

17. Commissioner's Report, Jurisdictional Statement, pp. 73-74.

18. Commissioner's Report, Jurisdictional Statement, pp. 72-73.

## III.

**The Lack of Substance As to the Questions Put by  
Appellant Regarding the Substantiality of the  
Evidence As to the Findings.**

**A. Increased Car Supply.**

The interests represented by these intervening appellees, the communities and shippers along Western's line, have a substantial interest in Western's car supply. Appellant argues that the finding that Santa Fe and Pennsylvania control of Western would result in an increased car supply for Western is not supported by the evidence because Santa Fe and Pennsylvania have experienced car shortages.<sup>19</sup> Appellant has experienced similar periods of car shortage (Tr. p. 1327). The problem of periodic periods of car shortages, however, is national in scope and is wholly unrelated to this finding. The record on this point is clear. In the first place, it was established that Santa Fe and Pennsylvania would increase Western's car supply by bringing Western's car-ownership to a proper level to accommodate the anticipated increase in originated traffic resulting from increased industrial development along Western's line (Tr. pp. 879-80).<sup>20</sup> Secondly, as joint owners of Western, Santa Fe and Pennsylvania would make a greater number of their own cars available to Western and in a period of car shortage, Western's shippers would be treated on a parity with their own shippers in car distribution (Tr. pp. 50-51, 505, 536, 680-81, 879, 889).

<sup>19</sup> Jurisdictional Statement, p. 20.

<sup>20</sup> References to the transcript are to the typewritten transcript which has been certified to this Court.

### **B. Economies and Operating Benefits Accruing to Western.**

Appellant urges that the finding that certain operating benefits would inure to Western under Santa Fe and Pennsylvania's control is unsupported by the evidence.<sup>21</sup> The Commission's finding in this regard points to the advantages accruing to Western, such as economies in purchasing, advice and assistance in techniques of railroad management and the realization of economies in operation.<sup>22</sup> The basis for them rests on the obvious advantages inherent in the control by two large, well-staffed roads. These benefits would, moreover, accrue to the advantage of the communities and shippers along Western's line.

### **C. Industrial Development.**

Appellant argues that the finding that Santa Fe and Pennsylvania would "permit" industrial development along Western is not supported by substantial evidence.<sup>23</sup> The finding, however, goes beyond the manner in which it is characterized by appellant. The finding reflects the fact that control of Western by Santa Fe and Pennsylvania will stimulate industrial development along Western's line.<sup>24</sup> This is based upon substantial evidence in the record establishing that the very fact that these two large roads, connecting in the east and west, would each have a substantial economic interest in Western, would itself serve to stimulate industrialization along its line (Tr. pp. 485, 491, 524, 630, 642, 690, 715-16, 734-35, 915, 929, 941, 952).

Appellant suggests that the finding is inconsistent with Santa Fe and Pennsylvania's competitive interests in the

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21. Jurisdictional Statement, p. 20.

22. Commission's Report, Jurisdictional Statement, p. 92.

23. Jurisdictional Statement, p. 19.

24. Commission's Report, Jurisdictional Statement, pp. 90-91.

area along their own lines.<sup>25</sup> This ignores the fact that the finding is based upon evidence that, because of Santa Fe's late entry into Chicago, it is lacking in industrial property in that area and that Pennsylvania is short of industrial sites in Illinois (Tr. pp. 225-26, 358, 378-79). Appellant argues that the finding conflicts with the testimony of Santa Fe and Pennsylvania's officers that they would locate on Western only those industries which they could not locate on their own lines.<sup>26</sup> This is not an accurate statement of the record and even if it were, it is not inconsistent with the Commission's finding since merely the consulting services of Santa Fe and Pennsylvania's industrial development departments would be of material assistance to Western (Tr. pp. 465, 643, 950).

Directly related to this finding is the fact that Western's existing status as a bridge-line handling east-west traffic along its entire line "is the greatest single underwriting influence" for continued good service to the communities along Western's line and, particularly, along the segment of its line West of Peoria (Tr. p. 51). In 1927, when the application was filed to connect with the Santa Fe at Lomax, it was pointed out that the proposed construction would aid in sustaining that part of the line west of Peoria. *Construction by TP&W R. R.*, 124 I.C.C. 278, 279 (1927). The retention of Western's existing function, therefore, is directly related to the industrial development of the communities along its line.

Each of the municipalities, civic and business associations and shippers along Western's line represented by the appellees offered extensive evidence which provided the basis for this finding. The unanimity of opinion of the

25. Jurisdictional Statement, p. 19.

26. Jurisdictional Statement, p. 20.



organizations concerned with the industrial development of these communities regarding this question suggests that there must exist some basis in fact for this conclusion.

#### **D. Santa Fe and Pennsylvania Parity Solicitation Policies.**

Appellant's characterization of the findings involved in this point are deceptive and are designed to raise a doubt concerning them.<sup>27</sup> Appellant appears<sup>28</sup> to be raising a question as to the substantiality of the findings regarding Santa Fe and Pennsylvania's parity solicitation policies in its statement of the questions presented.<sup>29</sup> Appellant's statements of the findings with respect to this policy are misleading in that they equate St. Louis and Chicago with the parity policy. The Commission, however, found that Santa Fe would place Lomax on a parity with Chicago from a solicitation standpoint and that Pennsylvania, while continuing to solicit for its long-haul to St. Louis, would place Effner on a parity with Chicago.<sup>30</sup> This is substantially different from the implication created by appellant in its statement of the findings contained in the argument and in the statement of the questions presented.

"The basis for these findings rests upon both the existing traffic policies of Santa Fe and Pennsylvania with respect to Western and the economics of the relationship existing between Western and both Santa Fe and Pennsyl-

27 Jurisdictional Statement, pp. 4, 19.

28 These intervening appellees say "improper" because appellant's treatment of this finding in its argument relates to the issue of suppression of competition via the Peoria Gateway, which it advanced in the proceedings before the Commission.

29 Jurisdictional Statement, p. 4.

30 Commission's Report, Jurisdictional Statement, pp. 75-76.



vania as joint owners of Western. The Commission found that, while Santa Fe and Pennsylvania ordinarily solicit traffic for their long-hauls, neither of them have worked against Western in recognition of the benefits they receive from Western's route.<sup>41</sup> The Commission found, furthermore, that as joint owners of Western, both Santa Fe and Pennsylvania are just about as well off financially<sup>42</sup> when handling traffic via Western as via a long-haul through Chicago.<sup>43</sup> The interests of Santa Fe and Western and Pennsylvania and Western thus coincide in the movement of traffic via Western. Santa Fe has a particularly strong interest in Western's route through Peoria because it enables the Santa Fe to obtain a long-haul through Lomax on traffic which it would otherwise handle only west of Kansas City or might not handle at all (Tr. pp. 99-100, 215, 220). The Commission found, finally, that, as a consequence of these policies, Western would have an increased opportunity to secure traffic now moving via other gateways.<sup>44</sup>

Appellant finally attempts to manufacture a conflict between the parity solicitation findings and the testimony of the officers of Santa Fe and Pennsylvania,<sup>45</sup> but the record fully supports the findings (Tr. pp. 49, 221-22, 337-38, 378).

41. Commission's Report, Jurisdictional Statement, p. 75.

42. This finding is directly contrary to the assumption underlying appellant's statement of the parity solicitation finding at page 19 of the Jurisdictional Statement.

43. Commission's Report, Jurisdictional Statement, p. 75.

44. Commission's Report, Jurisdictional Statement, p. 75.

45. Jurisdictional Statement, p. 19.

## CONCLUSION.

The District Court in holding that the Commission's order was valid was clearly right. It is submitted by these intervening appellees that it is manifest that the questions raised by the appellant on which the decision in this cause depends are so unsubstantial as not to need further argument, and the motion to affirm should be granted.

Respectfully submitted,

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